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U.S. Citizenship
and Immigration
Services

B6

FILE:

EAC 02 225 52040

Office: VERMONT SERVICE CENTER

Date: DEC 30 2004

IN RE:

Petitioner:

Beneficiary

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a computer-consulting firm. It seeks to employ the beneficiary permanently in the United States as a database administrator. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 4, 2001. The proffered wage as stated on the Form ETA 750 is \$64,000 per year.

On the petition, the petitioner stated that it was established on May 8, 2000 and that it employs three workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since October 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Burlington, Massachusetts.

In support of the petition, counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared a loss of \$5,004 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$32,112.

and current liabilities of \$608, which yields net current assets of \$31,504. Counsel submitted no other evidence of the petitioner's ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on November 15, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director noted that the evidence must consist of copies of annual reports, federal tax returns, or audited financial statements and must show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested a copy of the 2001 Form W-2 Wage and Tax Statement showing wages the petitioner paid to the beneficiary during that year.

In response, counsel submitted (1) an internally generated statement of debits and credits to the petitioner's checking account, (2) an internally generated statement of the closing balances of the petitioner's checking account for each month of 2001, (3) an internally generated list of payments the petitioner allegedly made to recruitment agencies for professional services rendered by "Software Consultants,"¹ (4) copies of contracts with those various firms, (5), a letter, dated December 18, 2002, from a bank, stating the balance of the petitioner's account on that date, (6) a letter, dated December 10, 2002, from one of the petitioner's clients, stating that they have been using the petitioner's database administrators and intend to continue, and that they intend to use database administration software that the petitioner is producing, (7) a letter, dated November 16, 2002, from another of the petitioner's clients, stating that it intends to introduce software the petitioner is developing to its own clients, and passing anticipated orders for that software to the petitioner, (8) a description of the software the petitioner is developing, which it anticipates will permit its technicians to monitor and administer databases remotely, and (9) information pertinent to a software development company in India.

In a letter dated December 30, 2002, counsel stated that the petitioner employed the beneficiary from October 2000 to April 2001 and from March 2002 to the present. Counsel stated that the petitioner was unable to employ the beneficiary from May 2001 to December 2001, which necessitated contractor database administrators to perform the duties of the proffered position. Counsel stated that the petitioner paid \$180,930 for the services of those contractors during 2001 and 2002, which amount counsel stated would have been available to pay the proffered wage if the petitioner had been able to employ the beneficiary.

Counsel further stated that release of the petitioner's remote database administration software during 2003 is anticipated to generate approximately \$500,000 for the petitioner and that the partnership with the Indian software development company is expected to generate approximately \$200 million during 2003.

Counsel did not submit copies of annual reports, federal tax returns, or audited financial statements as requested. Counsel did not submit the requested W-2 forms. Counsel did not explain those omissions.

¹ Counsel capitalized "Software Consultants," apparently indicating that it is a software consultant firm. Why, if that is so, payments for that firm's services were made to various other companies is unclear. A subsequent use of "Software Consultants" in another context clarifies that counsel meant that the payments were made to various firms for supplying software consultants.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 26, 2003, denied the petition.

On appeal, counsel explained that the petitioner did not previously submit the 2001 W-2 form showing wages paid to the beneficiary because it did not evince sufficient payments to show the ability to pay the proffered wage. Counsel stated that the beneficiary only worked for less than three months for the petitioner during 2001. Counsel further explained that no annual reports were submitted because they contain very limited financial information.

With the appeal, counsel submitted (1) a 2001 W-2 form showing that the petitioner paid the beneficiary \$9,999 during 2001, (2) a letter, dated April 15, 2003, from Archana Tripathi on the petitioner's letterhead and addressed "To Whom it May Concern," stating that the petitioner was paid \$6,300 as additional compensation for work done from January 2001 to March 2001, (3) a statement from a tax and financial service representative of the petitioner's 2001 monthly bank balances, (4) an internally generated 2001 income statement showing that the petitioner suffered a loss of \$5,004 during that year, and (5) statements pertinent to the beneficiary's investment and checking accounts.

Counsel stated, but provided no evidence to substantiate, that the \$9,999 shown on the 2001 W-2 form does not include the \$6,300 evidenced by the letter of April 15, 2003. Counsel urges that those amounts should be added together to calculate the total the petitioner's paid the beneficiary for less than three months work, and that the amount the petitioner paid, annualized, equals more than the annual amount of the proffered wage. Counsel did not explain why the additional compensation paid to the beneficiary was not included on his W-2 form, which should have documented all of his wages, tips, and other compensation. Counsel also argues that the monthly balances in the petitioner's checking account also show that it was able to pay the proffered wage.

Counsel also submitted a letter, dated April 5, 2003, from the petitioner's technical director. That letter states that when the beneficiary left the petitioner's employ to work out of state for higher pay the petitioner hired contract database administrators at \$55 to \$60 per hour to work for two clients, and that payments to one provider of contract workers ultimately cost a total of \$85,000. The letter stated that had the beneficiary still worked for the petitioner, he would have handled both projects. The letter observes that the petitioner paid \$109,620 for "sub contract labor" during 2001 and states over 75% of that amount was for database administrators, and that the amount would have been available to the beneficiary had he then been employed by the petitioner.

Finally, counsel, too, notes that the petitioner paid \$109,620 for "subcontract labor" during 2001, and that, according to the petitioner's technical director over 75% of that amount was for database administrators and would have been available to pay the proffered wage, had the beneficiary then been available to work for the petitioner.

Subsequently, counsel submitted (1) a form letter from the petitioner's bank, dated February 20, 2004, stating the balance of an account held by the petitioner, (2) another letter, dated August 26, 2004, from the same bank, stating the balances of two of the petitioner's accounts on that date, (3) invoices from TeknoBit Solutions showing that the petitioner bought consulting services from TeknoBit Solutions at prices ranging

from \$40 to \$90 per hour in amounts ranging from eight hours per week to 48 hours per week, during weeks from October 12, 2003 to January 25, 2004, (4) an internally generated list of the invoices the petitioner submitted to various clients from October 24, 2003 through August 25, 2004, and (5) the 2001 joint Form 1040 U.S. Individual Income Tax Return of the beneficiary and his wife.²

Counsel's reliance on bank statements, investment account statements, and other evidence of the amounts in those accounts is misplaced. First, such statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, such statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's account statements somehow reflect additional available funds that were not reflected on its tax returns.

In his letter of December 30, 2002, counsel stated that the beneficiary worked for the petitioner from October 2000 to April 2001, and worked elsewhere beginning in May. On appeal, counsel stated that the beneficiary worked for the petitioner for between two and three months during 2001.³ Counsel has not attempted to reconcile those apparently contradictory statements.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it employed the petitioner during some portion of 2001 and paid him \$9,999 during for his work. The April 15, 2003 letter states that he was paid \$6,300, but does not state whether the amount shown on the beneficiary's W-2 form is inclusive of that amount, as it should have been. Under the circumstances, that the petitioner paid the beneficiary more than \$9,999 during 2001 is insufficiently documented.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v.*

² The proposition that return was intended to support is unclear to this office.

³ At one point in the brief, counsel states that the beneficiary "worked only between two (2) and (3) three [sic] months with the petitioner [during 2001]. At another point, counsel states that the petitioner "paid [the beneficiary] for less than three months' [sic] of employment."

Sava, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$64,000 per year. The priority date is May 4, 2001.

During 2001 the petitioner paid the beneficiary \$9,999. That amount is less than the proffered wage. During that year the petitioner declared a loss of \$5,004. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its profits. The corresponding Schedule L shows that at the end of that year the petitioner had current net current assets of \$31,504. That amount is also less than the proffered wage.

Counsel states that the petitioner paid \$109,620 for subcontract labor during 2001. The petitioner's 2001 tax return supports that assertion. Counsel further states that over 75% of that amount, that is, over \$82,215, of that amount was for database administrators. If that statement is taken as fact, then petitioner has shown the ability to pay the proffered wage, as the beneficiary could have performed the duties and obviated the payment of that amount to subcontractors, thus freeing that amount to use toward paying the proffered wage.

The only evidence in support of that latter assertion, however, is the April 5, 2003 letter of the petitioner's technical director stating that the petitioner paid \$85,000 to a subcontractor for work the beneficiary could have performed. That evidence was apparently produced for use in this proceeding. It is not supported by business records or any other contemporaneous notation. That letter is insufficiently reliable to demonstrate that any portion of the fees the petitioner paid for contract labor during 2001 was paid for database administrators. The petitioner has not demonstrated, therefore, that any portion of the amounts paid to contract labor was available to pay the proffered wage.

Counsel also argues that the petitioner anticipates huge profits from the release of software and because of a partnership with an Indian software company. Counsel has submitted no evidence, however, that the

expectancy is reasonable. In the absence of any such evidence, the petitioner's anticipated cash influx is apparently speculative. No portion of the petitioner's anticipated increase in earnings will be considered.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.